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In The Matter of:

DATE ISSUED: February 10, 1994

Charles A. Webb

CASE NUMBER: 93-ERA-42

Complainant

v.

Carolina Power & Light Company

Respondent

.....

Michael D. Kohn, Esq.
for Complainant

Rosemary G. Kenyon, Esq.
Richard K. Walker, Esq.
for Respondent

BEFORE: NICODEMO DE GREGORIO
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

On April 5, 1993, Charles A. Webb (Complainant) filed a complaint of job discrimination against Carolina Power & Light Company (CP&L) under the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. §5851. In the course of an investigation conducted by the Wage and Hour Division of the U.S. Department of Labor, the scope of the complaint was enlarged to include a claim against Quantum Resources, Inc. (Quantum). CP&L and Quantum both requested a hearing. Webb has since settled his claim against Quantum. Thus, the current proceeding is solely against CP&L.

Following a period of discovery, CP&L filed a motion for summary decision on November 12, 1993. The parties have been allowed the opportunity to file responses and replies. The last

pleading was filed on January 11, 1994.

FACTUAL BACKGROUND

I

Carolina Power & Light Company operates the Brunswick Steam Electric Plant (Brunswick Plant), a two-unit nuclear power plant located in Southport, North Carolina. During all material times, CP&L had a contractual arrangement with diverse contract firms to provide CP&L temporary personnel to augment CP&L's regular work force. Quantum was one of the firms that supplied temporary workers to CP&L.

CP&L utilized two separate offices to recruit contract workers. CP&L's Nuclear Engineering Department (NED), which is based in Raleigh, North Carolina, retained workers for all the facilities of CP&L. The Brunswick Plant also had a contract office of its own, with responsibility to recruit contract workers for the operation and maintenance of the Plant in Southport.

Although the two contract offices were geographically and organizationally separate, they followed similar procedures in recruiting contract workers. When CP&L managers needed temporary workers, they notified one of the two contract offices. The office placed a job order with one or more contract firms, also called "shell vendors" or "vendor companies," setting forth the scope of the work to be done, the technical qualifications an applicant needed, and other relevant information. After obtaining permission from interested workers, the vendor companies submitted resumes to the recruiting office. The office then sent the resumes to the interested managers who made the hiring decisions.

II

Charles A. Webb has worked as a contract engineer in the nuclear industry since 1979. This employment history is remarkable because Webb has little academic education in engineering. In fact, Webb's formal education in engineering after graduating from high school consisted of one year's worth of civil engineering from the International Correspondence School. Webb Dep. at 6. This notwithstanding, Webb was repeatedly hired by CP&L for a variety of engineering work from 1985 to 1991. His last job for CP&L was as a contract civil/structural engineer at the Brunswick Plant, where he worked under the supervision of Richard Tripp and John McIntyre. On

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November 15, 1991, Webb completed his work and was laid off along with other workers. Webb makes no complaint about this termination. Webb Dep. at 93.

III

In April of 1992, the Brunswick Plant was shut down on account of some safety problems. The situation was reported in the local newspapers and on television. As a result of this

media coverage, Webb got the impression that CP&L was misleading the Nuclear Regulatory Commission (NRC) with regard to the time when the problems became known to CP&L. On April 25, 1992, Webb contacted the NRC by telephone in order to express his concerns about the safety of the Brunswick Plant. Subsequently, Webb met in person with NRC personnel and made eleven safety-related allegations. Webb asked NRC to keep his contacts confidential, and did not tell anyone about the contacts except his wife. On May 5 and 7, 1992, the NRC wrote to CP&L requesting an investigation and a report on four safety allegations. CP&L responded on June 29, 1992.

IV

Webb last worked in November of 1991, and by the time he contacted NRC at the end of April 1992 he was still unemployed. This result was not due in any way to a lack of interest in finding a job. On the contrary, Webb's deposition and a journal he started keeping in May of 1992 demonstrate extraordinary diligence in this regard. For instance, in January of 1992 Webb sent out 1400 resumes through Contract Engineering Weekly, a service that lists jobs. Webb Dep. at 20-21. Webb also sent out about 150 resumes on his own initiative. *Id.* at 33. In short, Webb's job search has been relentless. Unfortunately, these efforts had produced no job offer by September 10, 1993, the date of Webb's deposition.

Webb had heard that reporting safety problems to NRC was "career-limiting." After his contacts with NRC, Webb became apprehensive about his employment opportunities in the nuclear industry. It occurred to him that he should make a record of events and activities related to his search for jobs. Webb Dep. at 22-24; Webb Aff. ¶ 18. Accordingly, on May 23, 1992, Webb began keeping a journal in order to record the events of the preceding 30 days, as well as future events. Webb Journal, CX 28 at 1.

Webb had hopes of returning to CP&L, based on his knowledge

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of the work done at CP&L. In May of 1992, Webb was advised by Quantum that it had received job orders from CP&L for civil/structural engineers. Webb authorized Quantum to submit his resume for the jobs. Webb Aff. ¶ 9. On or about June 15, 1992, Webb called J.E. Harrell, a hiring supervisor at CP&L and Webb's second level supervisor during his last employment at CP&L, to find out why he had not been called back. Harrell told Webb that there was no reason why Webb could not return, and suggested that Webb have Quantum fax Webb's resume to him. CX 28 at 13; Webb Aff. ¶ 8. During July of 1992 Webb was advised by Sharon George, a manager at Quantum, that CP&L was hiring only degreed engineers for its design engineering group. *See* CX 28 at 25, 28; Webb Aff. ¶ 14. Webb was surprised because he had repeatedly worked for CP&L from 1985 to 1991 without a degree in engineering, and also because Harrell had told him there was no reason why he could not go back.

Although dismayed, Webb did not give up his quest for employment at CP&L. In July of 1992 Webb sought the aid of Tech Aid, another supplier of contract personnel, to obtain a position with Bechtel, an engineering firm that CP&L had selected to do some work at the Brunswick Plant. CX 28 at 27. Webb also claims that in July 1992 he authorized Sharon George at Quantum to submit his resume for field engineering jobs at CP&L, which did not require engineering degrees, and that he "eventually" received word from George that his resume had been submitted for field engineering positions. Webb Aff. ¶ 15. Webb's journal entries for July 20 and 22, 1992, do not support this claim. CX 28 at 28, 31. Months later, Webb had his resume submitted by Pacific Nuclear, also a provider of contract personnel, for a position at CP&L's Robinson Plant. CX 28 at 48. All along, Webb was also handing out his resume to friends working at the Brunswick Plant and elsewhere, in the hope that they would help him secure a position. Unfortunately, all the efforts proved unavailing.

SUMMARY DECISION

I

CP&L has moved for summary decision on Webb's complaint on two grounds. CP&L contends that Webb's complaint is untimely because it was filed outside the filing period allowed by the Energy Reorganization Act of 1974 (ERA). Moreover, CP&L contends that the undisputed facts demonstrate that no one at CP&L knew about Webb's allegations to the NRC, and thus Webb cannot make a

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prima facie case of discrimination. The motion is supported with numerous affidavits and depositions, which will be identified in the course of this discussion, as appropriate. In opposition to the motion for summary decision, Webb contends that CP&L's timeliness argument must fail because at least one act of discrimination occurred within the limitations period, relying on the doctrine of continuing violation. As to the second ground of the motion, Webb answers that there is enough circumstantial evidence, e.g, "fingerprinting," to establish that CP&L had knowledge that Webb was the source of the safety allegations that provoked the NRC investigation of the Brunswick Plant. Webb supports his response with his own affidavit, a written statement Sharon George gave to the Wage and Hour Division investigator, the report of this investigation, and certain other materials that will be mentioned as needed.

II

A motion for summary decision in an ERA case is governed by our Rules of Practice and Procedure, 29 C.F.R. §§18.40-18.41, which mirror Rule 56 of the Federal Rules of Civil Procedure. *Trieber v. Tennessee Valley Auth.*, Case No. 87-ERA-25, Dec. and Order of Secretary, Sept 9, 1993, slip op. at 7, 8. When a properly supported motion is made under section 18.40, the party

opposing the motion may not rest on mere allegations or denials, but must set forth specific facts showing that there is a genuine issue of fact for the hearing. A summary decision is proper if a party shows that there is no genuine issue as to any material fact, and the party is entitled to a decision in its favor. A summary decision may be entered against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. "In such a situation, there can be 'no genuine issue as to any material fact; since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552 (1986).

The substantive law determines which facts are material so that only disputes about facts that might affect the outcome of the case preclude the entry of a summary decision. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). Finally, not every dispute over a material fact is "genuine." Summary decision is precluded only if the party having the burden of proof shows sufficient evidence which, if

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established at a trial, would support a finding in its favor. *See Anderson*, *supra*, at 250-51, 106 S.Ct. at 2511; *Smith v. Tennessee Valley Auth.*, 90-ERA-12, Sec. Final Dec. and Order of Dismissal, April 30, 1992, slip op. at 4. For "the purpose of summary judgment is to head off trials the outcome of which is foreordained." *American Nurses' Ass'n v. Illinois*, 783 F.2d 716, 730 (7th Cir. 1986).

The substantive law that governs the making of a *prima facie* case of discrimination and the burdens of production and proof is well settled. To establish a *prima facie* case of discrimination under the ERA, the complainant must show that he engaged in protected activity of which the respondent was aware, that the respondent took adverse action against him, and he must produce evidence sufficient to raise an inference that the protected activity was the likely motive for the adverse action. *Dartey v. Zack Co. of Chicago*, Case No. 82-ERA-2, Sec. Order, April 25, 1983, slip op. at 8; *Bartlik v. Tennessee Valley Auth.*, 88-ERA-15, Sec. Final Dec. and Order, April 7, 1993, slip op. at 3. If a *prima facie* case is established, the respondent has the burden of producing evidence that the adverse action was motivated by legitimate reasons. *Id.* The complainant always bears the burden of proving by a preponderance of the evidence that retaliation is a motivating factor in respondent's action. *Id.*; *See St. Mary's Honor Center v. Hicks*, _ U.S. _, 113 S.Ct. 2742 (1993).

ANALYSIS

GENUINE ISSUE OF MATERIAL FACT

I

On July 27, 1993, a Prehearing Order was issued requiring Webb to file a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violation alleged. On August 2, 1993, Webb filed a Notice of the Acts and Omissions Giving Rise to Complaint. This pleading simply alleges that, in violation of the Act and regulations, CP&L and Quantum (1) failed to employ Webb for any outage which took place at any CP&L facility after November 1991, and (2) hindered his abilities to find a position elsewhere in the nuclear industry through blacklisting Webb within the industry. After a period of discovery and two responses to CP&L's motion for summary decision, the scope of the complaint still remains to be defined.

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It may help to understand this case, as well as Webb's propensity to use arguments in lieu of facts, if we consider the reasoning by which Webb reached the conclusion that he is a victim of discrimination. As mentioned above, Webb had heard that talking to the NRC is harmful to a career in the nuclear industry. Hence, in May 1992, while he was still making allegations to NRC, and prior to any indication that he would not go back to work for CP&L, Webb became apprehensive about discrimination. Webb Aff. at 8. This was the genesis of his journal. Also, after his November 1991 layoff, Webb made a persistent and wide-ranging search for jobs, which proved unproductive. This failure was a new experience for Webb, because prior to November 1991 he had found no particular difficulty securing work. By the summer of 1992, Webb came to believe that the explanation for this new experience must be found in discrimination. *See* Webb Dep. at 86-87.

At any rate, in view of the elements for a *prima facie* case of discrimination under the ERA, it is clear that Webb's random allegations of blacklisting on the part of CP&L cannot raise a genuine issue of material fact to preclude the entry of summary decision in favor of CP&L. Indeed, even if many of the allegations were mistaken for specific facts, they would be mostly irrelevant as a matter of law.

II

Although Webb repeatedly complains about "blacklisting," I do not find a specific allegation of a blacklist, in the sense of a "list of persons marked out for special avoidance, antagonism, or enmity on the part of those who prepare the list, or those among whom it is intended to circulate." *Eqenrieder v. Metropolitan Edison Co.*, Case No. 85-ERA-23, Sec. Order of Remand, April 20, 1987, slip op. at 6, n. 6. Nowhere does Webb allege that there is some document or other form of communication indicating that Webb should be denied employment, which CP&L has

distributed to its hiring personnel and to other employers in the nuclear industry. Yet, Webb's Notice of Acts and Omissions does charge that CP&L, in some undisclosed manner, has (1) denied employment to Webb, and (2) conspired with other employers to prevent Webb from finding employment elsewhere.

To the extent that the complaint herein charges some form of conspiracy between CP&L and other employers to exclude Webb from employment, that portion of the complaint must be dismissed. Webb has not identified any personnel of CP&L with knowledge of his NRC contacts, who has influenced the employment decision of

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any other employer to Webb's detriment. *See Trieber v. Tennessee Valley Auth.*, Case No. 87-ERA-25, Sec. Dec. and Order, Sept. 9, 1993, slip op. at 10-11.

With respect to C&PL's failure to reemploy Webb, there is no dispute that Quantum submitted Webb's resume to CP&L on at least three occasions, May 6, May 13, and June 15, 1992. On May 6, 1992, Webb's resume was submitted for one of two structural engineering positions at the Brunswick Plant. Geoff Wertz, the hiring supervisor, stated by affidavit that Webb was eliminated from consideration for lack of an engineering degree, and another applicant who had a four-year degree was hired. Wertz Aff. ¶ 2. Wertz further states that he did not know, and had no reason to suspect, that Webb had been in contact with NRC. Wertz Aff. ¶ 3.

On May 13, 1992, Quantum submitted Webb's resume for an unspecified position in NED. This was a "blind submittal," which was made contrary to CP&L's standard procedures which required the contracting firm to designate the position for which a resume was submitted. There is no evidence as to the outcome of this submission. Cooke Dep. at 17; Duncan Dep. at 41-43; 52-53.

The third submission was made on June 15, 1992 for an engineering position located at the Brunswick Plant. According to Webb's journal, on this date Webb telephoned J.E. Harrell to inquire why Webb had not been called back. CX 28 at 13. Harrell stated that there was no reason Webb could not go back, and suggested that Webb have Quantum submit the resume to him. *Id.* Webb then called Quantum to request the submittal. *Id.* Harrell testified by deposition that upon receipt of the resume he eliminated Webb from consideration because Harrell was seeking a degreed engineer, and Webb did not have a degree. Harrell Dep. at 39-40. Harrell also testified that prior to the instant proceeding it never occurred to him that Webb might be the source of the safety allegations made to NRC. Id at 104.

Webb also had Chuck Kestner of Pacific Nuclear, another organization providing contract workers, submit his resume for positions at the Robinson Plant, another facility of CP&L. Don Dyksterhouse, the project engineer who attempted to fill the positions, stated by affidavit that he was subsequently instructed by CP&L not to fill the positions, so that no one was hired. Dyksterhouse Aff. ¶ 3. Kestner informed Webb in

December of 1992 that CP&L would not fill the positions. Kestner Aff. ¶ 2.

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Webb, however, alleges additional acts of discrimination on the part of CP&L. He strenuously contends in his Reply to CP&L's Motion for Summary Decision, dated December 7, 1992, that in July of 1992 he authorized Quantum's manager, Sharon George, to submit his resume for a lower-paying field engineer position, which did not require a degree, and that he was advised by George that his resume was submitted. In his Second Response to the motion, Webb constructs elaborate arguments on the foundation of Deposition Exhibit 25, and on the possibility that Quantum's business records are not complete or accurate.

I believe there can be no genuine issue on this point. Quantum's business records indicate that Webb's resume was never submitted after June 15, 1992. CP&L Exh. 11 (Webb's Submittal History) and CP&L Exh. 12 (Contact Entry), both attached to the Cooke Affidavit. Michele Cooke and Sharon George, a present and former employee of Quantum, have both testified that Quantum did not submit Webb's resume for any CP&L position after June 15, 1992. George Dep. at 100-102; George Aff. ¶ 3; Cooke Aff. ¶ 4. Webb argues that the investigation report of the Wage and Hour Division investigator is admissible evidence. I agree, but at least on this point the report does not help his case because it concludes that after June 15, 1992 Quantum never submitted Webb's resume to CP&L again. CX 2 at 5, 6.

As for Deposition Exhibit 25, it cannot support the weight that Webb places on it. This record of Quantum, entitled Requirement Entry, reflects a job order from CP&L, dated June 8, 1992, for field engineering positions requiring no education; Webb's submittal on June 15, 1992; and a notation under Status Report that only Webb had been ruled out. Webb insists that this document establishes that Webb's resume was submitted for such a field engineering position. This contention is rebutted by the evidence which establishes that the position for which Webb's resume was submitted on June 15, 1992, was the civil/structural position which Harrell was trying to fill. Cooke testified in her deposition that the job description in Deposition Exhibit 25 was erroneous, due to a misunderstanding that the position did not require a degree. It was Webb who called Cooke's attention to the error, after learning from Action Tech, one of Quantum's competitors, that the job order required a degree. Cooke Dep. at 20-21, 49. This testimony is corroborated by the Contact Entry record of Quantum, and by Webb's journal entry on June 15, 1992, concerning his telephone conversation with Harrell. Finally, Webb finds discrimination in the fact that he continued to seek a job at CP&L by getting co-workers to hand-deliver copies of his resume to managers at the Brunswick Plant, and in the fact that a

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former supervisor, Richard Tripp, expressed a negative opinion

concerning his productivity and personality. I believe this contention is insufficient. In order to make out a *prima facie* case of discrimination under the ERA, Webb must identify an adverse action taken by CP&L. *See Shehadeh v. Chesapeake & Potomac Tel. Co.*, 595 F.2d 711, 729 (D.C. Cir. 1978); *Samodurov v. General Physics Corp.*, Case No. 89-ERA-20, Sec. Dec. and Order, Nov. 16, 1993, slip op. at 9, 11.

In sum, Webb has shown no evidence that CP&L has taken any adverse action against him other than the rejection of his applications submitted through Quantum on May 6 and June 15, 1992. The rejection of his application through Pacific Nuclear was not a discriminatory act in that the positions were never filled. *See Samadurov v. General Physics Corp.*, Case No. 89-ERA-20, Sec. Dec. and Order, Nov. 16, 1993, slip op at 9, 11. Finally, Webb's allegations of continuous job searches through intermediaries and any possible actions or omissions by Quantum and other contract organizations, even if fully proved, provide no basis for relief against CP&L. *Id.*

III

One of the grounds on which CP&L seeks summary decision is that there is no evidence that CP&L knew that Webb had contacted the NRC. Knowledge of complainant's protected activity is of course an essential element of a *prima facie* case of discrimination. Thus, if CP&L's contention on this issue is valid, summary decision is proper.

Webb argues vigorously that an employer's knowledge of protected activity may be proven by circumstantial evidence. This is quite true. Indeed, as the Secretary has stated recently, the allocation and order of burdens of proof and production set forth in *Dartey v. Zack Co.* are applicable only where circumstantial evidence of discrimination is presented. *Bartlik v. Tennessee Valley Auth.*, Case No. 88-ERA-15, Sec. Final Dec. and Order, April 7, 1993, slip op. at 4. But, I do not agree that the speculations that Webb advances in this case are circumstantial evidence of knowledge.

Since Webb argues generally that the scope and nature of the allegations raised by Webb to the NRC allowed "CP&L" to fingerprint Webb as the source of the allegations, I start with the observation that the contention is insufficient as a matter of law. In order to show that he could establish at the hearing the knowledge element of his *prima facie* case, Webb must have

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evidence that the *employees* of CP&L who made, or participated in, the adverse actions complained of had the requisite knowledge. *Bartlik v. Tennessee Valley Auth.*, *supra*, slip op. at 4 n. 1.; *Crobsy v. Hughes Aircraft Co.*, Case No. 85-TSC-2, Sec. Dec. and Order, Aug. 17, 1993, slip op. at 23-24. Specifically, Webb must show that Wertz and Harrell were aware of his NRC contacts.

Webb contends that, even though he had told no one of his NRC contacts other than his wife, and even though the NRC assured him of confidentiality, CP&L somehow found out about his contacts. Webb originally suspected that someone at NRC had revealed his identity to CP&L. Thus, on September 8, 1992, Webb called NRC personnel to express his concern in this regard. Webb Dep. at 138-40. Webb suspected that John McIntyre, an employee of NRC from 1991 to October 1992, had learned about his contacts with NRC and disclosed his identity to CP&L. In his deposition, Webb admitted he had no facts to support this allegation, (Webb Dep. at 139-42), and McIntyre had disclaimed such knowledge in his affidavit. McIntyre Aff. ¶ 3. Finally, on March 25, 1993, in the course of an interview, an investigator from NRC's Office of the Inspector General explained to Webb the concept of "fingerprinting," how a utility could determine the identity of an NRC alleger based solely on the content of the allegations. Webb Aff. ¶ 22. Webb's contention now is that his numerous allegations of safety defects that had been discovered at the Brunswick Plant as far back as 1988 helped pinpoint him as the author of the allegations.

The concept of fingerprinting, as formulated by the NRC's investigator and Webb at the interview, is as follows. If a series of specific allegations are brought to a licensee's attention that only one person knows, and if that person reports them to the NRC, and if the NRC then brings up those specific concerns to the management, that's known as fingerprinting. *See* Taylor interview at 43-44, attached to Complainant's Reply of December 7, 1993. Simply stated, if certain information is within the exclusive possession of one person, and subsequently a second person shows knowledge of it, a reasonable inference is that the first person has disclosed the information. If this formula is taken literally, it does not help Webb's case. At Webb's deposition, counsel for CP&L examined Webb with respect to each issue he had raised with NRC. Webb admitted that he was not "particularly associated" with any of the issues Webb Dep. at 208. Indeed, it is ironic that the newspaper article that incited Webb to call first the newspaper editor, and then the NRC, related to missing bolts on the walls of the Diesel Generator Building, about which Webb had heard "snatches of

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conversations" when he first arrived at Brunswick in about 1988. CX 28 at 1-3.

Moreover, assuming that someone could have identified Webb as the author of the NRC allegations, it does not follow that someone did. Webb does not identify who did the work of identification. We are not told whether Harrell and Wertz identified Webb independently or together, or whether a third party did the work and notified Harrell and Wertz that Webb was the NRC contact. I note finally, that the investigator from the Wage and Hour Division did not find that Webb was fingerprinted. The investigator concluded that there were "numerous ways" that CP&L "could have" known that Webb complained to the NRC, including knowledge from John McIntyre and fingerprinting. CX 2 at 10.

In sum, Webb had repeatedly stated that his allegation of fingerprinting is based on assumptions and speculations. *See* Webb Dep. at 148-49, 162-63, 173-74. Considering that Wertz and Harrell have specifically denied under oath kowledge of Webb's NRC contacts, I find that there is no genuine issue of fact on this essential element of a *prima facie* case. It follows that CP&L is entitled, as a mater of law, to a summary decision in its favor.

Timeliness of Complaint

I

CP&L also seeks summary decision on the ground that the complaint filed on April 5, 1993 is untimely. Webb contends that this limitations argument falls short in two respects. First, Webb asserts that blacklisting is by its nature a continuing violation, so that as long as one specific act of discrimination occurs within the limitations period the entire complaint is timely. Second, Webb contends in effect that the statute of limitations never commenced to run, because at no time before the filing of the complaint was he given unequivocal notice that CP&L was rejecting him for field engineering positions. Complainant's Reply to CP&L's Motion for Summary Decision at 8-9. Webb also contends that, to defeat the motion, he need only demonstrate that a factual dispute exists as to whether or not his resume was submitted for non-degreed field engineering positions, and that it is improper at the summary decision stage to weigh the strengths or weaknesses of the competing factual assertions. Complainant's Response to Respondent's Reply Brief at 1-2.

II

As a preliminary matter, I reject CP&L's contention that the employee protection provision of the ERA requires a complaint to be filed within 30 days after the occurrence of the alleged violation. The October 24, 1992 amendments to section 210 (presently, section 211) of the ERA, which extended the filing period to 180 days, apply to Webb's complaint, inasmuch as the complaint was filed after the date of the enactment of the amendments.

I also reject Webb's contention that in ruling on a motion for summary decision, it is improper to weigh the strengths and weaknesses of the opposing factual contentions, at least if this means that any evidence supporting the nonmoving party's case, even though not significantly probative, presents a genuine issue for trial. *See Anderson v. Liberty Lobby,Inc.*, 477 U.S. 242, 249-52, 106 S.Ct. 2505, 2510-12 (1986). A properly supported motion for summary decision raises the threshold issue whether there is a need for a trial, and a trial is not needed unless the party opposing the motion demonstrates that he has sufficient evidence which, if credited, would support a finding

in his favor. *Id.* This is true even when a motion for summary decision is based on the untimeliness of the complaint, an affirmative defense on which the moving party has the burden of proof.

III

Webb's argument based on the lack of notice as the outcome of his alleged application for a field engineering position may be disposed with the observation that it rests on a false factual predicate. As explained above, Webb's resume was never submitted for such a position, and the fact that he never learned the fate of such an alleged submittal only lends more support to my finding on this issue.

With respect to Webb's continuing violation argument, I agree with Webb that the timeliness of a claim of such a violation is measured from the last discriminatory act. The difficulty lies in distinguishing a continuing violation from a series of discreet acts of violation.

Case law on the subject of continuing violations has been described as inconsistent and confusing. *Berry v. Board of Sup'rs of L.S.U.*, 715 F.2d 971, 979 n. 11 (5th Cir. 1983). Where a complaint attacks an employment policy or practice that continues in effect within the prescribed filing period, the

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doctrine of continuing violation presents no particular difficulty. *See Bruno v. Western Elec. Co.*, 829 F.2d 957, 960-61 (10th Cir. 1987); *Shehadeh v. Chesapeake & Potomac Tel. Co.*, 595 F.2d 711, 724 (D.C. Cir. 1978). The difficulty arises where a claim of continuing violation is based on a series of allegedly discriminatory acts. *See Berry v. Board of Sup'rs of L.S.U., supra*, 715 F.2d at 981.

I am of the view that the doctrine of continuing violation always presupposes a policy or practice that continues in effect over time, whose existence in some cases is demonstrated independently of its applications, while in other cases is inferred from a series of applications. Several unconnected acts of discrimination against an individual, even if they are all motivated by his protected activity, do not constitute a continuing violation because completed acts are not of a continuing nature. *Helmstetter v. Pacific Gas & Elec. Co.*, Case No. 86-SWD-2, Sec. Dec. and Order of Remand, June 15, 1989, slip op. at 8; *English v. General Elec. Co.*, Case No. 85-ERA-2, Sec. Final Dec. and Order, Feb. 13, 1992, slip op. at 5. Even where blacklisting is alleged, analysis must start by identifying precisely the unlawful employment practice complained of, because repeated denials of employment do not constitute a continuing violation unless the denials are based on some allegedly discriminatory practice. *Egenrieder v. Metropolitan Edison Co.*, Case No. 85-ERA-23, Sec. Order of Remand, April 20, 1987, slip op. at 6.

In the instant case, while Webb alleges blacklisting, no evidence is shown of the existence of any "blacklist" or discriminatory practice. When allegations of fruitless job searches through intermediaries and of "bad-mouthing" are put aside, as they do not constitute adverse actions by CP&L, only the rejection of Webb's submittals for civil/structural engineering positions by Wertz and Harrell is identified. Webb knew by July of 1992 that he was not going to get the position. Webb Aff. ¶¶ 14-15. Webb knew enough to file a complaint at least by September 21, 1992, when he told Michele Cooke of Quantum that he was being blackballed and planned to sue CP&L. Because Webb's complaint was filed on April 5, 1993, both dates are outside the 180-day filing period.

Accordingly, there is no genuine issue as to the untimeliness of the complaint. There is no sufficient evidence of blacklisting to make out a case of continuing violation. Moreover, even if the two rejections constituted blacklisting, and thus a continuing violation, the complaint would still be time-barred because the last rejection occurred more than 180 days prior to the filing of his complaint.

RECOMMENDED ORDER

The complaint of discrimination filed by Charles A. Webb pursuant to section 211 of the Energy Reorganization Act of 1974, as amended, is dismissed.

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NICODEMO DE GREGORIO
Administrative Law Judge

NDG/sjn